89-868

No. _____

In The

Supreme Court of the United States

October Term, 1989

PHILIP W. L. LUM,

Petitioner,

v.

RAYMOND JENSEN, ROBERT DRAKE, and STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. By 1984, had this Court established that a public employee with a property interest in continued employment was entitled to substantive due process under the Fourteenth Amendment?

2. Is a Court of Appeals bound by decisions of this Court until overruled, despite a perceived conflict among the Circuits, in determining if a defendant in an action under 42 U.S.C. §1983 is entitled to qualified immunity because his conduct did not violate clearly established law?

3. Absent binding authority, is a lower court in an action under 42 U.S.C. §1983 required to ascertain what the law in its jurisdiction would have been at the time of the alleged violation in determining if a defendant is entitled to qualified immunity because his conduct did not violate clearly established law?

4. What law is a court required to consider in determining if the conduct of a defendant in an action under 42 U.S.C. §1983 violated clearly established law?

LIST OF PARTIES/RELATED ENTITIES

All parties to the proceeding in the Court of Appeals are listed in the caption. Supreme Court Rule 28.1 concerning corporations does not apply to this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Philip W. L. Lum asks this Court to review by certiorari the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on May 31, 1989. The Ninth Circuit denied a petition for rehearing and rehearing en banc on August 11, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported. *Lum v. Jensen*, 876 F.2d 1385 (9th Cir. 1989). A petition for rehearing and rehearing en

banc were denied. *Lum v. Jensen*, No. 87-2896 (Aug. 11, 1989). The unpublished order denying rehearing and rehearing en banc is attached as an appendix to this petition.

JURISDICTION

This Court has jurisdiction to entertain this petition for a writ of certiorari from a final judgment of a Circuit Court of Appeals. 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the substantive due process guarantees of the Fourteenth Amendment and the remedy provided by Congress for violation of constitutional rights in 42 United States Code Section 1983.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property without due process of law . . . ."

Title 42, Section 1983 of the United States Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioner Philip W. L. Lum (Lum) was employed by the State of California Department of Justice in its Salinas laboratory as a criminalist, a civil service position. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir. 1989). Among his duties were forensic examination of evidence to be used in criminal cases including blood samples, firearms and drugs. His duties included testifying in court in support of conclusions he drew from these examinations.

Raymond Jensen (Jensen) was Lum's immediate supervisor and Robert Drake (Drake) was Bureau Chief of Lum's division. 876 F.2d at 1386. Relying upon information and grounds they knew were baseless and did not justify termination, Jensen and Drake terminated Lum effective May 18, 1984. *Id.* Lum appealed his dismissal and was reinstated by the California State Personnel Board (the Board). The opinion of the administrative law judge who heard Lum's administrative appeal (which was adopted by the Board) found there were no facts supporting the charges against him and many of the grounds alleged were not a legal basis for termination.

B. Summary of Procedural History

On January 26, 1987, Lum filed a complaint under 42 U.S.C. §1983 alleging violation of his right to procedural due process and related state law claims. The complaint, as amended, alleged violation of the Fourteenth Amendment's guarantees of substantive and procedural due process. Specifically, the complaint alleged Jensen and Drake had fabricated the case against him knowing some of the

charges did not justify dismissal and knowing none of them were supported by facts. Lum alleged his dismissal was arbitrary, capricious, and pretextual.

The defendants moved for summary judgment on the grounds they were entitled to qualified immunity from any damages liability. Lum moved for partial summary judgment on the grounds the Board's decision collaterally estopped the defendants from relitigating the underlying facts.

The district court ruled defendants had not denied Lum procedural due process and granted summary judgment for defendants on that claim. The district court found that, if Lum proved the defendants knew the charges against him were groundless and did not justify termination, the defendants were not entitled to qualified immunity. Defendants were denied summary judgment on the substantive due process claim. The district court denied Lum's motion for partial summary judgment on the grounds triable issues of fact prevented finding as a matter of law that his termination was arbitrary, capricious and pretextual.

Defendants filed an interlocutory appeal from the order denying summary judgment on immunity grounds. *See generally Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The Ninth Circuit Court of Appeals reversed. The panel concluded "there was no clearly established constitutional right to substantive due process protection of continued public employment" at the time of Lum's termination in 1984. *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989). The panel did not consider itself bound by *Harrah Independent School District v. Martin*, 440 U.S. 194

(1979) (per curiam), which squarely held a state employee was entitled to substantive due process from arbitrary dismissal from "tenured" employment. 876 F.2d at 1389. The panel, while conceding *Harrah* was on point, refused to follow it with the cryptic notation: "The Court, however, *only summarily addressed the existence of a substantive due process right. Id.* (emphasis added).

The panel found no binding authority entitling public employees to substantive due process protection in the Ninth Circuit. 876 F.2d at 1387 *distinguishing Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976). The panel's survey of the case law in 1984 found the substantive due process right clearly established in the Second, Fifth, Tenth and Eleventh Circuits. 876 F.2d at 1387. It found no clear law on the question in the First, Third, Fourth and Sixth Circuits, 876 F.2d at 1387-88. The panel found the Eighth Circuit had expressly noted the question was unclear. *Id.* at 1388 *citing Moore v. Warwick Public School District*, 794 F.2d 322 (8th Cir. 1986). It found the Seventh Circuit had held substantive due process did not apply to state-created property interests. *Id. citing Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983).

The panel did not determine for itself what the Ninth Circuit would have done if confronted with the issue in 1984. *Cf. Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985) (in the absence of binding precedent, the court "may consider" what the Circuit or the Supreme Court would have done). Instead, the panel decided that, because the Circuits were divided on the substantive due process issue, there was no clearly established law on the question and the defendants were entitled to qualified immunity. 876 F.2d. at 1389.

Lum's petition for rehearing and rehearing en banc was denied. *Lum v. Jensen*, No. 87-2896 (9th Cir. Aug. 11, 1989).

REASONS FOR GRANTING REVIEW

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER CLEARLY ESTABLISHED LAW GUARANTEES SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO PUBLIC EMPLOYEES WITH A PROPERTY INTEREST IN CONTINUING EMPLOYMENT

This Court first applied Fourteenth Amendment substantive due process protections against arbitrary and capricious State action to public employees thirty-seven years ago. *See Weiman v. Updegraff*, 344 U.S. 183, 192 (1952) (exclusion from state employment for refusal to take a loyalty oath was arbitrary and capricious). *See also Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (disqualification from the right to practice law based on former membership in the Communist Party arbitrary and capricious). In the 1970s, this Court first recognized that a tenured State employee had a property interest in continued employment. *See Perry v. Sinderman*, 408 U.S. 593, 601-602 (1972).[1]

In 1979, this Court applied substantive due process review to the decision to terminate a tenured teacher to determine if it was "arbitrary" under the Fourteenth

[1] It is conceded Lum had a property interest in continued employment. *See Skelly v. State Personnel Board*, 15 Cal.3d 194, 206 (1975).

Amendment. *Harrah*, 440 U.S. at 198-99. *See also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (substantive due process analysis applied to zoning); *Kelly v. Johnson*, 425 U.S. 238 (1975) (substantive due process analysis applied to "liberty" interest in personal appearance); *Thompson v. Louisville*, 362 U.S. 199 (1960) (conviction of crime with no supporting evidence violates substantive due process). This line of authority is binding on all lower courts, *see, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958), and would seem to end the inquiry into clearly established law.

The Ninth Circuit, however, felt free to ignore this authority because it believed "[t]he Court . . . only summarily addressed the existence of a substantive due process right [in *Harrah*]." 876 F.2d. at 1389. The reference was "summary" presumably because this Court felt no need to rehash thirty years of precedent in a per curiam opinion. "Summary" or not, the rulings of this Court are binding until overruled and certiorari should be granted in this case to make this clear.

The First Circuit has recently held that the right of a public employee to substantive due process was indeed clearly established in 1984. *See Newman v. Commonwealth of Massachusetts*, 884 F.2d 19, 24-25 (1st Cir. 1989). The Court in *Newman*, while recognizing the perceived conflict in the Circuits noted by the panel in this case, 884 F.2d at 25, held the law was clearly established in its Circuit and therefore the defendants were not entitled to qualified immunity. *Id. citing McEnteggart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir. 1971) & *Drown v. Portsmouth School District*, 451 F.2d 1106, 1108 (1st Cir. 1971). The First Circuit, like the Ninth Circuit, did not feel bound by this Court's precedent: "[T]he Supreme Court several

times in the last decade has sidestepped the question of whether the Fourteenth Amendment provides substantive protection against arbitrary and capricious academic decision-making." 884 F.2d at 25 *citing Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985); *Harrah;* & *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). The First Circuit, like the Ninth Circuit, did not refer to or analyze the substantive due process cases decided before this trilogy much less explain why they were not binding.

The split in the circuits perceived by the First and Ninth Circuits is illusory. All of the circuits with precedent of the issue hold public employees with a property interest in continued employment are entitled to substantive due process of law. *See McEnteggart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir. 1971); *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984); *Kowtoniuk v. Quarles*, 528 F.2d 1161, 1165-66 (4th Cir. 1975); *Thompson v. Bass*, 616 F.2d 1259, 1268 (5th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980); *Parham v. Hardaway*, 555 F.2d 139, 142 (6th Cir. 1977); *Miller v. Dean*, 552 F.2d 266, 268 (8th Cir. 1977); *Bignall v. North Idaho College*, 538 F.2d 243, 249-50 (9th Cir. 1976)[2]; *Brenna v. Southern Colorado State College*, 589 F.2d 475, 477 (10th Cir. 1978); *Barnett v. Atlanta Housing Authority*, 707 F.2d 1571, 1577 (11th Cir. 1983).

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[2] The Court in *Bignall* stated the complaint raised the issue of substantive due process. 538 F.2d at 244-45. Relying on *Perry v. Sinderman*, the Court found that the representations made to Bignall established a form of implied or *de facto* tenure. 538 F.2d at 246. One of the "promises" which created this tenure

(Continued on following page)

Brown v. Brienen, relied upon by the Courts of Appeals in *Lum* and *Newman* to find a conflict among the circuits, does not deny substantive due process rights to public employees with a property interest in continued employment. The Court in *Brown* held that, while a tenured employee had a property interest in continued employment, every breach of his employment agreement was not a deprivation of a property interest. 722 F.2d at 364-65. The "property" in *Brown* was compensatory time off. 722 F.2d at 363. The Court held state-created contract rights received substantive due process protection if they were a form of property and a right to compulsory overtime was not "property". 722 F.2d at 366-67.

(Continued from previous page)

was that Bignall would only be terminated because of financial exigency. *Id.* at 249. The Court then addressed whether or not the College's statement that Bignall was being fired because of financial exigency was arbitrary or a pretext.

> Assuming for present purposes only that the Bignalls stated a *prima facie* case that the College fired her in violation of her *de facto* tenure rights, the College bore the burden of proving that there was a financial exigency and that Schuler [the College president] adopted and used a uniform set of procedures for all faculty. 538 F.2d at 249.

The Court then examined evidence which demonstrated the College indeed suffered from financial difficulties (the reason given was not a pretext) and all faculty members had been subjected to the same evaluation when the College picked those persons who were to be terminated (the standards for termination were not arbitrary). 538 F.2d at 249-50. The Court then concluded "the College non-retained Mrs. Bignall for valid, constitutionally permissible reasons." 538 F.2d at 250. This reflected the Court's conclusion that substantive due process guarantees had been observed.

Even in the Seventh Circuit, continuing employment is property since the Supreme Court has squarely held this. Even under its restrictive view of property, the Seventh Circuit would apply substantive due process to termination of a tenured employee. *Cf.* 722 F.2d at 363 (conceding due process applies to property interest in continuing employment).

Nonetheless, the Courts of Appeals are clearly split over whether a right to substantive due process for public employees with a property interest in continued employed is clearly established. This split represents more than a difference of opinion in the Circuits; it reflects a failure, if not refusal, to recognize this Court's earlier clear precedent as binding. In addition, the split creates the anomalous situation that one circuit recognizes substantive due process rights as clearly established law, another does not, and both express some doubt that the right exists at all. *See Newman*, 884 F.2d at 25; *Lum*, 876 F.2d at 1389. This result could not have been foreseen when this Court crafted in broad outlines a right to qualified immunity in actions under 42 U.S.C. Section 1983. See *infra* at 11. This Court should grant this petition to reaffirm that public employees with a property interest in continuing employment are guaranteed substantive due process by the Fourteenth Amendment.

THIS COURT HAS NOT SPECIFIED THE LAW WHICH DETERMINES WHETHER A DEFENDANT IN A CASE UNDER 42 U.S.C. §1983 IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED LAW. THE COURT SHOULD MAKE CLEAR THAT ITS PRECEDENT IS BINDING UNTIL OVERTURNED AND, IN THE ABSENCE OF PRECEDENT IN THEIR JURISDICTION, LOWER COURTS MUST DETERMINE WHAT THE LAW IN THEIR JURISDICTION WOULD HAVE BEEN AT THE TIME OF THE VIOLATION

Individual defendants[3] in actions under 42 U.S.C. §1983 are entitled to qualified immunity from liability for damages if "their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982). Stated differently, a defendant is entitled to immunity unless his conduct violates clearly established constitutional rights and a reasonable official would know that what he was doing violated pre-existing law. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

This Court has not specified what the lower courts are to consider in determining if the law is "clearly established." *But cf. Procunier v. Navarette*, 434 U.S. 555, 565 (1978) (examining precedent in this Court, the Ninth Circuit Court of Appeals and district courts in the Ninth Circuit where the violation occurred). The Circuits which

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[3] Local government entities have no qualified immunity in suits under 42 U.S.C. §1983. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

have directly confronted the issue differ in the "law" to be considered in making this inquiry.

The First Circuit has held that, in the absence of binding authority from this Court or its Circuit, the law is not clearly established. *See Knight v. Mills*, 836 F.2d 659, 668-69 (1st Cir. 1987). *But see Estrada-Adorno v. Gonzalez*, 861 F.2d 304, 305-306 (1st Cir. 1988) (surveying law of sister Circuits).

The Third Circuit apparently applies "general legal principles" from at least this Court and the other Courts of Appeals. *See People of Three Mile Island v. Nuclear Regulatory Commission*, 747 F.2d 139, 144 & 146-47 (3d Cir. 1984).

In *Wallace v. King*, the Fourth Circuit held it was to consider precedent from this Court, the "appropriate" Court of Appeals and the highest State Court in which the violation occurred. 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981). The Fourth Circuit considered the "appropriate" Court of Appeals to be the Fourth Circuit. *Id.*

The Sixth Circuit has adopted three apparently conflicting standards. *Compare Masters v. Crouch*, 872 F.2d 1248, 1251-52 (6th Cir. 1989) (this Court, Sixth Circuit, other courts within the Circuit and other Courts of Appeals) *with Ohio Civil Service Employees Association v. Seitzer*, 858 F.2d 1171, 1177 (6th Cir. 1988) (this Court, Sixth Circuit and district courts in the Sixth Circuit; remaining Courts of Appeals only if issue is "clearly foreshadowed") and *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (adopting the reasoning of *Wallace v. King*, *supra*, but interpreting it to allow consideration of *any*

precedent in the Courts of Appeals). *Cf. Tucker v. Callahan*, 867 F.2d 909, 913 (6th Cir. 1989) (relying on Ninth Circuit precedent to find clearly established law).

The Seventh Circuit has intimated both that the inquiry is restricted to examination of precedent in this Court and its Circuit alone, *see Colaizzi v. Walker*, 812 F.2d 304 (7th Cir. 1987), and that precedent in this Court and *any* Court of Appeals is to be considered. *See Powers v. Lightner*, 820 F.2d 818 (7th Cir. 1987). *See also Rokovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc) (approving *Powers* standard).

The Ninth Circuit seems to have dealt with the problem in the greatest depth. It examines all available case law. *See Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). The right can be clearly established even in the absence of Ninth Circuit precedent. *See Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2016 (1988). In the absence of precedent, the court is to evaluate the decision the Ninth Circuit or this Court would have reached if presented with the question. *See e.g., Wood v. Ostrander*, 851 F.2d 1212, 1217-19 (9th Cir. 1988) (applying Seventh Circuit precedent and concluding Ninth Circuit would follow its analysis). *But see Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1113 (9th Cir. 1988) (absent a Ninth Circuit analysis, the law is not clearly settled); *Todd v. United States*, 849 F.2d 365, 371 n. 10 (9th Cir. 1988) (court exercising jurisdiction over the denial of summary judgment on qualified immunity grounds, *see Mitchell*, 472 U.S. at 530, exceeds its jurisdiction if it "establishes law.") *Cf. Capoeman*, 754 F.2d at 1514 (court "may consider" how this Court and the Ninth Circuit would have ruled).

The Eleventh Circuit has not expressly identified the law to be reviewed but has noted that a single district court decision from another Circuit is an insufficient basis for finding clearly established law. *See Muhammad v. Wainwright*, 839 F.2d 1422, 1425 (11th Cir. 1987).

The Courts of Appeals are similarly divided over the effect of a split in the Circuits on the question of clearly established law. *See generally People of Three Mile Island*, 747 F.2d at 144 (noting this Court has not ruled on the effect of a split in the Circuits on the question).

The Tenth Circuit has held that, if faced with disarray in the Courts of Appeals and no precedent in this Court, the panel must determine for itself what the law would have been in its Circuit had the issue been addressed. *See Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987), *cert. denied*, ___U.S.___, 108 S.Ct. 1220 (1988). The Seventh Circuit has held that, in the absence of precedent in this Court or its Circuit, a split in the Circuits automatically precludes a finding that the law was clearly established. *See Smart v. Simonson*, 867 F.2d 429, 433 (1989); *Bensen v. Allphin*, 786 F.2d 268, 275 n.16 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). The Ninth Circuit aligned itself with the Seventh Circuit in the present case.

The position adopted by the Seventh and Ninth Circuits means there will be no remedy for violations of substantive due process in those Circuits until this Court squarely addresses the issue. This is precisely the objection noted in *Garcia*. 817 F.2d at 658. "This is not to say, of course, that such a right does not exist; it may very well, but only in a conceptual vacuum." Rudovsky, *"Anderson v. Creighton*: Another Turn of the Screw" 77 in 4 *Civil*

Rights Litigation Handbook (1988 ed.). Consigning constitutional rights to a vacuum is inconsistent with the "unflagging obligation" of federal courts to exercise their jurisdiction to remedy violations of those rights. *See Tovar v. Billimeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980) *quoting Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976). It is likewise inconsistent with the obligation of the Circuits in other contexts to determine the law in the absence of binding precedent. *See, e.g., Daily v. Parker*, 152 F.2d 174, 177 (7th Cir. 1945) (obligation to predict state law in the absence of precedent in diversity cases).

If the position adopted by the Seventh and Ninth Circuits prevails, the constitutional rights of State employees will simply freeze where they are today as a result of a convergence of five lines of cases:

(1) A plaintiff in a case under 42 U.S.C. § 1983 is not entitled to injunctive relief unless he can demonstrate the constitutional violation will reoccur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). (2) A plaintiff is not entitled to declaratory relief unless he can demonstrate the constitutional violation will reoccur. *See Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977) (per curiam). (3) An individual defendant may avoid liability for damages unless the law is clearly settled. *See Harlow*. (4) If the plaintiff can establish no claim for damages against the individual defendant, he can state no claim that the government entity's regulations permitted unconstitutional conduct. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). (5) The States and individuals acting in official state capacities are not persons under 42 U.S.C. §1983. *See*

Will v. Michigan Department of State Police, ___U.S.___, ___, 109 S.Ct. 2304, 2312 (1989).

New constitutional decision-making involving state employees would occur only when the state has an officially adopted policy which applies generally, *e.g.*, a statute. Absent a statute, a single decision by a policy-making state official, *see generally City of St. Louis v. Praprotnik*, ___U.S.___, 108 S.Ct. 915 (1988), would not be grounds for relief unless the law was clearly established in the Circuit. If a split in the Circuits means the law is not clearly established, then the official has individual qualified immunity, the State cannot be sued, the official cannot be sued in his official capacity and the plaintiff (who has now been injured) cannot demonstrate the conduct will occur again.

If the Circuits are not required to establish internal precedent, the development of constitutional law concerning State employees will simply end in the Courts of Appeals. Absent a decision from this Court, all that will remain are actions for declaratory and injunctive relief attacking the constitutionality of statutes and damages claims based solely on the law as it exists today. This Court will become not only the final arbiter but the sole arbiter of constitutional rights. This Court must act in this case to prevent the further "Balkaniz[ation] [of] the rule of qualified immunity" it sought to avoid in *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

CONCLUSION

Petitioner lost his employment in violation of the Fourteenth Amendment's guarantee that he would not be deprived of property without due process of law. The Ninth Circuit Court of Appeals has held this deprivation did not violate clearly established law and Petitioner accordingly has no remedy. The Ninth Circuit did not follow binding precedent from this Court. Assuming precedent is unclear, the panel's determination that a split in the Courts of Appeals precludes a finding of clearly established law abdicates its obligation to implement the remedy provided by Congress to enforce Constitutional rights.

Petitioner respectfully asks this Court to issue a writ of certiorari to reestablish the primacy of its precedent, to clarify the standards to be applied in ruling on qualified immunity issues in cases under 42 U.S.C. § 1983 and to reinforce the obligation of the Courts of Appeals to implement this remedy for violation of Constitutional rights.

Dated: November 9, 1989

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP W. L. LUM Plaintiff-Appellee, v. RAYMOND JENSEN, ROBERT DRAKE, and THE STATE OF CALIFORNIA, Defendants-Appellants.	)	No. 87-2896 D.C. #CV-86-0134-RAR ORDER (Filed Aug. 11, 1989)

Before: CHOY, CANBY and NORRIS, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Canby and Norris vote to reject the suggestion for rehearing en banc and Judge Choy so recommends.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.